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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CELL-CRETE CORPORATION, Plaintiff and Respondent, v. SAFECO INSURANCE COMPANY OF AMERICA, Defendant and Appellant.	G051112 (Super. Ct. No. 30-2013-00651798) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Law Offices of Crawford & Bangs and E. Scott Holbrook, Jr., for Defendant and Appellant.

Law Offices of David L. Brault, David L. Brault and Robert C. Lindkvist for Plaintiff and Respondent.

* * *

The trial court concluded a "sub-subcontractor" was entitled to collect its fee for materials and labor from a payment bond on a public works project, despite its execution of unconditional waivers prior to the performance of its work. We affirm the judgment in favor of plaintiff Cell-Crete Corporation (Cell-Crete) and against defendant Safeco Insurance Company of America (Safeco).

FACTS

The facts were largely undisputed at the one-day bench trial. There is no challenge to the sufficiency of the evidence supporting the court's factual findings, which were set forth in a statement of decision.

The Parties to this Lawsuit

Orange County Public Works (the County) hired general contractor Los Angeles Engineering, Inc. (LA Engineering), to complete a construction project in Yorba Linda (the Project). Safeco issued a payment bond[1] in the sum of $7,210,400 in connection with the Project.

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[1] "A direct contractor that is awarded a public works contract involving an expenditure in excess of twenty-five thousand dollars ($25,000) shall, before commencement of work, give a payment bond to and approved by the officer or public entity by whom the contract was awarded." (Civ. Code, § 9550, subd. (a).) "A payment bond shall be in an amount not less than 100 percent of the total amount payable pursuant to the public works contract." (Civ. Code, § 9554, subd. (a).)

All statutory references are to the Civil Code. For the most part, we will cite only the currently applicable statutes (effective July 1, 2012), although some of the relevant conduct occurred prior to that date. Though renumbered and reorganized, the law remains largely the same. When necessary, we will cite pre-July 1, 2012 law.

LA Engineering hired subcontractor Vadnais Corporation (Vadnais) in June 2011 to perform work on the Project in exchange for $2,118,175. Vadnais in turn hired Cell-Crete in July 2011 to perform a portion of the work subcontracted to Vadnais.

In its operative complaint, Cell-Crete sued the County, LA Engineering, Vadnais, and Safeco under a variety of legal theories. The only parties to this appeal, however, are Cell-Crete and Safeco. We therefore tailor the recitation of facts to focus on Cell-Crete's cause of action against Safeco for enforcement of a public works payment bond.

Initial Contract and July 2011 Preliminary Notice

The July 2011 contract between Vadnais and Cell-Crete attached a proposal outlining the scope of work (i.e., "place up to 500 cubic yards of cellular grout") and a price of $37,894.47. Both Vadnais and Cell-Crete knew at the time that the proposed work entailed the use of a different material than that required by the County job specifications, but they thought this alternative would be acceptable.

On July 15, 2011, Cell-Crete sent a preliminary notice[2] to the County, LA Engineering, and Vadnais with regard to its proposed work at the Project, to wit, "furnish and install engineered fill concrete." The preliminary notice estimated the price of labor, services, equipment and material at $37,894.47. Obviously, this preliminary notice was consistent with the work Cell-Crete intended to perform under its July 2011 contract with Vadnais.

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[2] "A preliminary notice shall be given not later than 20 days after the claimant has first furnished work on the work of improvement." (§ 8204, subd. (a).) "The preliminary notice shall . . . include: [¶] (a) A general description of the work to be provided. [¶] (b) An estimate of the total price of the work provided and to be provided." (§ 9303.)

Cell-Crete, however, did not actually perform any work in 2011 or the early part of 2012. The July 2011 proposal was not accepted by the County because it was not in accord with the County's specifications. Thus, Cell-Crete did not perform any work on its original contract with Vadnais.

Key Documents, the Effect of Which Determine the Outcome of this Dispute

Cell-Crete began its initial test work in June 2012 and performed the bulk of its work in August 2012. Before this work was performed, three new documents had been executed by Cell-Crete. A lack of clarity in the drafting of these documents created the basis for the waiver defense advanced by Safeco.

First, on April 5, 2012, Cell-Crete executed and delivered *another* preliminary notice to the parties to this lawsuit, nearly identical to the July 15, 2011 preliminary notice. The only differences between the two notices were the dates, as well as the name and title of the individual Cell-Crete employees who signed the two notices. The description of the work and the estimate of the price were identical. The second notice did not suggest it applied to a different contract. From the perspective of an uninformed observer, this would have appeared to be a pointless, duplicative document. But according to testimony by a Cell-Crete employee, the second preliminary notice was necessary "[b]ecause the first contract got voided out and there was a second contract to be proposed and distributed, therefore, we knew the work was going to be done, so this [notice] pertained to these revised contracts." The description and price used in the second notice were likely the same because Cell-Crete did not yet have sufficient information about the necessary changes to complete the job to the County's satisfaction.

Second, on April 20, 2012, Cell-Crete signed a document designated as an unconditional waiver and release upon final payment,[3] which represented that Cell-Crete had been "paid in full for all labor, services, equipment or material furnished" at the Project. The document further stated Cell-Crete "does hereby waive and release any right . . . against a labor and material bond on the job, except for disputed claims for extra work in the amount of $0." The document featured the following "NOTICE" at the bottom: "THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM."

Third, on May 23, 2012, Cell-Crete signed a *second* document designated as an unconditional waiver and release upon final payment. This document was formatted and organized differently. But the operative language said much the same thing: Cell-Crete "has been paid in full" and "does hereby waive and release . . . any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in [Cell-Crete's] position, except for disputed claims for extra work in the amount of $0.00." The same "NOTICE" was provided at the bottom of the document in all capital letters.

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[3] Under both law applicable at the time and current law, a mechanic's lien and related claims (i.e., to enforce a stop payment notice or a payment bond) cannot be waived or otherwise impaired except in a writing that follows prescribed forms and includes specific disclosures. (Former § 3262, as amended by Stats. 2006, ch. 538, § 58); see now §§ 8120-8138.)

Neither of these waiver/release documents specified they were applicable only to the July 2011 contract (between Vadnais and Cell-Crete). In fact, however, that is what Cell-Crete and Vadnais intended. According to testimony believed by the court, Cell-Crete and Vadnais intended for Cell-Crete to release claims only under the July 2011 contract. Vadnais asked for the *first* unconditional waiver and release (dated April 20, 2012) "to close out the . . . first contract." Vadnais asked for the *second* unconditional waiver and release (dated May 23, 2012) because it wanted to use its own form for legal and recordkeeping purposes. Thus, both waivers were intended to apply to the "first contract" from July 2011; there was no intent to prospectively waive rights under a forthcoming second contract.

On May 29, 2012, Cell-Crete issued a new proposal for the same basic work specified in the July 2011 proposal. This proposal, however, expanded the amount of expected work ("up to 605 cubic yards") and used the materials originally specified by the County ("30% cement, 70% fly ash grout"). The new price quoted was significantly higher — $125,813.08. This new arrangement was further memorialized in an unsigned contract between Cell-Crete and Vadnais, dated August 8, 2012.

Cell-Crete did not issue a third preliminary notice reflecting the price terms of the second contract with Vadnais.

Cell-Crete Did Not Get Paid

Cell-Crete completed its work in accordance with its second contract with Vadnais. LA Engineering had actual notice Cell-Crete was performing its work at the Project site during the summer of 2012. Cell-Crete sought payment from Vadnais by invoicing it on September 4, 2012. Vadnais sought payment from LA Engineering (both to pay Cell-Crete and for other work Vadnais had performed). But the last payment to Vadnais by LA Engineering was on August 24, 2012, and this payment was for invoices submitted before Cell-Crete started its work on August 20, 2012.

The money stopped flowing at the Project because of a dispute between the County and LA Engineering. The last payment on the Project by the County to LA Engineering was on August 13, 2012. The County at some point decided it did not owe any more money to LA Engineering; to the contrary, LA Engineering allegedly owed the County more than $450,000 in liquidated damages. This is *not* a case in which Vadnais secured payment from LA Engineering for the work done by Cell-Crete. There is no evidence LA Engineering paid money to Vadnais in reliance on the waivers, only for Vadnais to stiff Cell-Crete.

Instead (as recited in the statement of decision), LA Engineering "looked through its file and, figuratively, found two preliminary notices, two contracts, and two unconditional waivers and releases. It refused to pay Vadnais for Cell-Crete's work, assuming that Cell-Crete had released its claim for all work done under both contracts." LA Engineering's usual procedure to make sure all parties that have issued preliminary notices are paid is to request releases and issue joint checks. But because it "had a final release from [Cell-Crete] . . . that means they were done on the Project."

Vadnais filed stop payment notices with the County in January and April 2013, ultimately alleging that LA Engineering owed Vadnais more than $1 million. Cell-Crete filed a stop payment notice in the amount of $140,013.08 with the County on February 1, 2013. A notice of completion of work on the entire project was recorded by the County on March 8, 2013. Other than $20,000 paid to Cell-Crete in January 2014, Cell-Crete has not been paid for its work.

This lawsuit ensued. Among other things, the court found Safeco liable under the payment bond in the amount of $90,813.08, plus costs. The court made several observations supporting this result. "Cell-Crete did not release its claims because the releases predated the contract in question by several months." "Although the releases would certainly apply to the earlier contract, as intended by Cell-Crete and Vadnais, they did not intend to release claims under the contract not yet negotiated." "Did Cell-Crete

comply with its preliminary notice obligations? [¶] Yes. The preliminary notice of April [5], 2012 is effective. Although it does not state the correct amount of the second contract and predates both unconditional waivers and releases, the preponderance of the evidence shows this preliminary notice applied to the work Cell-Crete was going to do under the August 8, 2012 contract."

The court entered judgment in accordance with its statement of decision and subsequently awarded attorney fees to Cell-Crete in the amount of $82,725.

DISCUSSION

California law protects the economic interests of those tasked with improving others' property. Most prominent among the protections is the mechanic's lien, which is enshrined in our state Constitution. (See *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 888-889.) But a mechanic's lien is not available on public works projects. (See 1 Marsh, Cal. Mechanics' Lien Law and Construction Industry Practice (6th ed. 2015) § 2.3 (Marsh).)[4] Subcontractors (and sub-subcontractors) who have not been paid for public works jobs have two other remedies — the stop payment notice (§ 9350 et seq.) and the payment bond (§ 9550 et seq.). (See Marsh, *supra*, § 6.2.)

[4] "The right inherent in a mechanics lien carries with it the power to force a sale of real property to effect its purposes. Obviously, for this reason, it would be against public policy to allow mechanics liens to attach to public property." (Marsh, *supra*, § 2.8.)

"Interpretation of California's mechanic's lien statutes and of California's public policy regarding . . . waiver of mechanic's lien rights presents questions of law we consider de novo. [Citations.] . . . [Citation.] We review the trial court's factual findings for substantial evidence." (*Moorefield Construction, Inc. v. Intervest-Mortgage Investment Co.* (2014) 230 Cal.App.4th 146, 154 (*Moorefield*).)

Payment Bonds

"Public works payment bonds . . . provide a cumulative remedy to unpaid subcontractors on public works projects." (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 563 (*Oldcastle*).) "[P]ublic works payment bonds inure to the benefit of materialmen and subcontractors of any tier of a public works project and . . . any such materialmen or subcontractors may maintain a direct action against the sureties. [Citations.] A surety's liability under a public works payment bond arises when a contractor fails to pay for work performed by materialmen or subcontractors under the contract." (*Ibid*.) A surety is not released from liability on a bond by alterations to the work or payment terms of an improvement. (§ 8152, subds. (a), (b).)

Cell-Crete satisfactorily completed work on the Project but was not fully paid for the work by Vadnais. Cell-Crete is, in general, the type of party entitled to rely upon a payment bond. (See §§ 9100, subd. (a)(1), 9554, subd. (b)(1); see also Marsh, *supra*, § 6.15 ["except for the direct contractor, anyone who would have had a right to a mechanics lien but for the project being a public works project is protected by the payment bond"].)

Sufficiency of Preliminary Notice

The April 5, 2012 preliminary notice was an effective predicate to Cell-Crete's claim against the payment bond. (§ 9560, subd. (a) ["In order to enforce a claim

against a payment bond, a claimant shall give the preliminary notice" described in § 9300 et seq.]; see *Oldcastle, supra,* 170 Cal.App.4th at p. 564 [one element of payment bond cause of action is proving service of "preliminary 20-day notice"].)[5]

"[T]he preliminary 20-day notice is designed to be used by every potential claimant on every job, as a matter of routine, and it must be used in this way in order to avoid loss of lien rights in case they are unexpectedly needed later." (Marsh, *supra,* § 4.22.) Such notices "protect the contractors from so-called 'secret liens' arising under work and materials furnished by subcontractors." (*Duncanson-Harrelson Co. v. Travelers Indemnity Co.* (1962) 209 Cal.App.2d 62, 67; see also *San Joaquin Blocklite, Inc. v. Willden* (1986) 184 Cal.App.3d 361, 368 [purpose of notice provisions is "to alert the owner or general contractor (and his bonding company) that someone with whom the owner or contractor has no direct contractual relationship is asserting a claim"].)

There is no contention that Cell-Crete failed to provide a timely 20-day preliminary notice to all interested parties, using the correct method of transmission. All relevant parties, including Safeco, were on statutory notice that Cell-Crete was working on the Project pursuant to a subcontract with Vadnais.

Nor was there anything wrong, per se, with Cell-Crete providing a preliminary notice before its work began, which underestimated ($37,894.47) the amount

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[5] Unlike mechanics' liens or stop payment notices (§§ 8200, subd. (c), 9300, subd. (c)), subcontractors can still enforce their right to payment against a payment bond even if they fail to provide a preliminary notice. (See §§ 9300, subd. (d), 9560, subd. (b) ["If preliminary notice was not given . . . , a claimant may enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement"], 9562; see also Stats. 1994, ch. 974, § 8 [same rule under former § 3252, subd. (b)].) But there is no suggestion by Cell-Crete that it met its notification obligations in this alternative fashion. (Cf. *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1197-1201 [claimant with tardy 20-day preliminary notice can rely on alternate "special notice" for full recovery of claim against payment bond].)

it would ultimately seek on the payment bond (more than $100,000). (See § 8206.) Safeco did not argue that the $37,894.47 figure included in the preliminary notice was not a reasonable and logical attempt to estimate the expected final bill. (See *Rental Equipment, Inc. v. McDaniel Builders, Inc.* (2001) 91 Cal.App.4th 445, 447 [affirming trial court's holding that preliminary notices were defective because $10,000 figure was not "derived by a rational process, based upon relevant factors"].)

In short, the April 5, 2012 preliminary notice was sufficient for purposes of Cell-Crete's claim against the payment bond.

Alleged Waiver of Right to Collect on Payment Bond

The issue presented is whether Cell-Crete is foreclosed from collecting on the payment bond notwithstanding its unimpeachable work on the Project and adequate preliminary notice.

In assigning error to the trial court, Safeco puts its faith in the waivers executed by Cell-Crete in April and May 2012. Safeco accepts (for purposes of appeal) the factual premise that Cell-Crete did not intend to waive or release its payment bond rights on the work it was preparing to complete in the summer of 2012. But Safeco claims Cell-Crete's subjective intent was beside the point. According to Safeco, the objective legal effect of the documents executed by Cell-Crete was the release and waiver of its rights under section 9000 et seq., including payment bond rights. Safeco points to: (1) the symmetry of two waivers wiping out two pre-waiver preliminary notices; (2) the identical information in the two preliminary notices, undercutting a third party's ability to know the second preliminary notice referred to a second, renegotiated contract; and (3) the lack of any references in the waivers to specific contracts with specific dates.

Safeco pleaded the affirmative defense of waiver in its answer. "All case law on the subject of waiver is unequivocal: '"Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts."'"

(*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60.) "The pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right." (*Ibid*.) "Courts examine the defense of waiver carefully in order to ensure the protection of a party's rights, especially when these rights are statutorily based." (*Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1011.) Hence, Safeco is wrong (at least in general terms) in positing that intent is irrelevant to a waiver defense. There is substantial evidence supporting the court's finding that Cell-Crete did not intend to waive its statutory rights under the second contract. Though the timing and contents of the documents are confusing, the testimony explaining the existence of the documents is convincing and convinced the trial court. There was no contrary evidence indicating Cell-Crete actually intended to waive all rights to the payment bond on its forthcoming work at the Project. Indeed, upon a fair consideration of all of the facts of this case, the notion that the waivers were intended to apply to future work by Cell-Crete is somewhat incredible. (See *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, *supra*, 15 Cal.4th at p. 889 [advance waiver of lien rights may not be extracted as term of subcontract; "waiver and release of mechanic's lien rights is permitted only in conjunction with payment, or a promise of payment"].)

Safeco also pleaded estoppel as an affirmative defense. "'[E]stoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts.'" (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, *supra*, 30 Cal.App.4th at p. 59.) Safeco asserts it "had a right to rely on the releases." But there is no evidence in the record of detrimental reliance. LA Engineering's after-the-fact refusal to pay anything for Cell-Crete's work is not reliance. (*Washburn v. Kahler* (1892) 97 Cal. 58, 60 [where no money is paid by owner in reliance on false receipts, plaintiff is not estopped by provision of receipts to contractor]; cf. *Ware Supply Co. v. Sacramento*

Savings & L. Assn. (1966) 246 Cal.App.2d 398, 404-407, 409 [construction lender relied on plaintiff's waiver to its injury by releasing payment to general contractor, who did not pay plaintiff].) It is not as if LA Engineering and/or Safeco were ordered by the court to pay twice for the work performed by Cell-Crete. Instead, the waivers were reviewed by LA Engineering after the payment claim was made, and were used to support a litigation position, i.e., no payment to Cell-Crete was required by law and so no payment would be given to Cell-Crete.[6]

The parties do not actually discuss general legal principles pertinent to waiver and estoppel in their respective briefs. Instead, the discussion is limited to former section 3262,[7] which places limits on the efforts of owners, general contractors, and others from impairing the statutory rights of claimants. "Courts have recognized former section 3262 reflected the Legislature's concern that owners and original contractors may use their superior bargaining power to extract lien waivers from subcontractors and material suppliers. [Citation.] Historically, therefore, original contractors have been burdened, rather than benefited, by the statute." (*Moorefield*, *supra*, 230 Cal.App.4th at p. 155.) Safeco argues courts are obligated to find that a waiver matching the form prescribed by former section 3262, subdivision (d)(4), and issued subsequent to that party's preliminary notice, is conclusive against the party signing it without regard to the other facts of the case. We therefore turn to an examination of former section 3262.

"Neither the owner nor original contractor by any term of their contract, or otherwise, shall waive, affect, or impair the claims and liens of other persons whether

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[6] We note that even if LA Engineering had relied on the waivers, that would not necessarily provide an estoppel defense to Safeco. (See *Powers Regulator Co. v. Seaboard Surety Co.* (1962) 204 Cal.App.2d 338, 341-343, 345-347 [rejecting surety's estoppel defense based on the reliance of the principal in the context of an action by a sub-subcontractor against a payment bond].)

[7] The waivers/releases were executed before July 1, 2012, so former section 3262 is applicable to the question of whether they were valid.

with or without notice except by their written consent, and any term of the contract to that effect shall be null and void. Any written consent given by any claimant pursuant to this subdivision shall be null, void, and unenforceable unless and until the claimant executes and delivers a waiver and release. *That waiver and release shall be binding and effective* to release the owner, construction lender, and surety on a payment bond from claims and liens *only if the waiver and release follows substantially one of the forms set forth in this section and is signed by the claimant* or his or her authorized agent." (Former § 3262, subd. (a), italics added; see now §§ 8122, 8124.) Safeco points to the italicized portion as determinative of the issue here. But nothing in this subdivision deems a compliant form to be definitive on the question of waiver. Instead, placed in context, this statute merely nullifies the effectiveness of waivers not complying with the "forms set forth in this section . . . ."

The next subdivision of the statute illustrates that traditional requirements of waiver and estoppel defenses are still pertinent. "No oral or written statement purporting to waive, release, impair, or otherwise adversely affect a claim *is enforceable or creates any estoppel* or impairment of a claim *unless either*: [¶] (A) *It is pursuant to a waiver and release prescribed in this section.* [¶] (B) The claimant had actually received payment in full for the claim." (Former § 3262, subd. (b)(1), italics added; see now § 8126 [similar provision].) This language is consistent with defendants being required to prove the affirmative defenses of waiver or estoppel, not just the existence of a signed waiver in the proper form.

We agree with Safeco that Cell-Crete could waive its rights under the payment bond (or, for that matter, become estopped by the provision of a waiver), despite a lack of actual payment to Cell-Crete. The forms utilized by Cell-Crete appear to comply with the requirements of former section 3262, subdivision (d)(4), as an unconditional waiver and release upon final payment. (See now § 8138 [similar form].) This form should be used where "the claimant is required to execute a waiver and release

in exchange for, or in order to induce payment of, a final payment and the claimant asserts in the waiver it has, in fact, been paid the final payment." (Former § 3262, subd. (d)(4).) Had Cell-Crete signed either waiver in order to procure payment on the second contract (e.g., if Vadnais said it could only get paid by LA Engineering for Cell-Crete's work with a waiver from Cell-Crete), a court would uphold the waiver despite a lack of payment (e.g., if Vadnais then used the money from LA Engineering for another project instead of paying Cell-Crete, then became insolvent)[8] (See *Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 124 Cal.App.4th 780, 797 [rights waived by conditional waiver up to date specified, despite lack of payment for all equipment delivered by that date].)

But former section 3262 does not state that, in the absence of actual payment, the existence of a compliant document is *all* a defendant must prove in every case (even one as unusual as the instant one). The court rightly looked to all of the circumstances, including the intent of Cell-Crete in executing the waivers. The court was entitled to find (1) Cell-Crete did not waive its right to collect on the payment bond for the work performed in the summer of 2012, and (2) Cell-Crete was not estopped from citing its April 2, 2012 preliminary notice.

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[8] Cell-Crete never performed any work on the first contract, so it did not actually accrue any statutory rights on the first contract. In one sense, the waivers were meaningless with regard to the first contract (i.e., what is the effect of waiving a right one does not actually have?). But it was still prudent of Vadnais to clear the books on the first contract to discourage potential false claims; the waivers are certainly evidence confirming the fact that Cell-Crete had not performed any work through the date of their execution.

DISPOSITION

The judgment is affirmed. Cell-Crete shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.